Supreme Court, U.S.
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No. 04-1205

IN THE

# Supreme Court of the United States

JAMES J. CLANCY, acting as a
Private Attorney General and for himself,

*Petitioner*,

v.

A.T.& T. CORP., a New York Corporation; COMCAST CORP., a Pennsylvania Corporation; and COMCAST OF CALIFORNIA VII, INC., a Washington Corporation,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION ONE

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the California Court of Appeal err in sustaining respondents' demurrers and dismissing petitioner's complaint on its face, without leave to replead, where petitioner lacked standing to allege his California state law claims, and failed to state any cognizable cause of action under applicable state law?

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent A.T.&T. Corp. has no parent corporation, and no public company owns 10% or more of its stock.

Respondent Comcast Corporation has no parent corporation, and no public company owns 10% or more of its stock. Respondent Comcast Corporation is the parent company of Respondent Comcast of California VII, Inc.; no public company (other than Comcast Corporation) owns 10% or more of the stock of Comcast of California VII, Inc.

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Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari to review the decisions of the California Court of Appeal, Second Appellate District, Division One, affirming the trial court's sustaining of respondents' demurrers and dismissing this action on the face of the pleadings, without leave to replead.

## STATEMENT OF THE CASE

Petitioner James J. Clancy ["Clancy"] is a California attorney who claims to have 38 years of experience specializing in obscenity litigation. Living in the Los Angeles area, he formerly received cable television service from Respondent A.T.&T. Corp. ["AT&T"]. However, due to a purchase of assets, Petitioner's current franchised cablecaster is Respondent Comcast of California VII, Inc., whose parent company is Respondent Comcast Corporation.

The cable broadcasts which are available to Petitioner include adult-themed, sexually oriented motion pictures of a highly graphic nature. In order to receive such cable broadcasts, however, in addition to paying a fee for the underlying cable television services, Petitioner is also required to pay an additional pay-per-view fee as a premium charge.[1] As relevant, the additional cable charge to petitioner Clancy was $11.95 per three-hour segment of broadcasts (C-2). As set forth by the Court of Appeal, during 2001 Petitioner voluntarily recorded some 460 adult motion pictures broadcast by AT&T, including 121 separate film titles (C-3).

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[1] The underlying facts are stated in one of the Opinions of the California Court of Appeal appealed from, case no. B168827, annexed to the petition as Appendix "C."

Petitioner Clancy made numerous attempts to persuade Los Angles City and County officials to stop the cable broadcast of sexually explicit motion pictures by Playboy Enterprises, Inc. through its cable television broadcast channels (The Hot Network and The Hot Zone) as a public nuisance. When the government officials declined to take legal action to abate the cablecasts, Petitioner commenced the instant lawsuit in Los Angeles Superior Court on October 4, 2002, filing it in his own name as a "private attorney general" pursuant to California law (C-4). Petitioner's 88-page complaint, with numerous exhibits, essentially contended that the adult motion pictures broadcast by AT&T[2] were obscene per se moral public nuisances and contraband. Petitioner sought a ruling, in part, that AT&T (and subsequently Comcast) should be ordered to cease its cablecast of "hardcore pornography" to consenting adult viewers, and cancellation of the cable television broadcast franchise. In addition to the cablecasters, Petitioner initially named as defendants Vivid Video, Inc. and Vivid Entertainment Group for supplying the alleged pornographic videos, several Playboy entities for owning the adult cable television networks broadcasting the subject videos, and various Los Angeles City and County officials for failing to abate the "pornographic" cablecasts (C-4, C-5).

All defendants filed demurrers to the complaint, asserting *inter alia* that Petitioner lacked standing to assert a public nuisance since he was not specially damaged; that Petitioner failed to state a cause of action for unfair business practices under California Business and Professions Code Section

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[2] AT&T's cable television broadcast interest in the Los Angeles area was subsequently acquired by Respondent Comcast of California VII, Inc., whose parent is Respondent Comcast Corporation [collectively "Comcast"].

17200 *et seq.*; and that the entire complaint was unintelligible. Petitioner also sought (by mandamus) to require the trial court to view several adult videos which he had attached as exhibits.

Ultimately, over several different proceedings, the trial court sustained all demurrers by the various defendants, without leave to replead. The California intermediate appellate court, the Court of Appeal, Second Appellate District, Division One, affirmed the demurrers and the dismissal of Petitioner's complaint against all defendants without leave to replead, in three separate proceedings. Copies of the Court of Appeal's Opinions in the actions against Respondents AT&T and Comcast affirming the dismissals are respectively annexed to the petition as Appendices "C" and "D."

Thereafter, Petitioner unsuccessfully sought leave to appeal to the California Supreme Court in all three instances. The California High Court's denial of leave as to Respondents AT&T and Comcast are respectively annexed to the Petition as Appendices "A" and "B." Petitioner has also made various requests for rehearing to the California Court of Appeal as well, but these have been denied (petition p.2).

Petitioner now brings his instant petition for certiorari to this Court with regard to the decisions of the California Court of Appeal as to Respondents AT&T Corp. and Comcast. Petitioner did not seek certiorari of the Court of Appeal's affirmance of the trial court's sustaining of the demurrers dismissing the complaint as against the Vivid defendants, the Playboy entities, or Los Angeles officials.[3]

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[3] The California Supreme Court's denial of leave to appeal to Mr. Clancy on the first Court of Appeal's affirmance of the demurrer to his complaint is referenced at D-3.

## REASONS FOR DENYING THE PETITION

### I. Petitioner Has Failed To State A Claim For Relief.

The general reasons for granting certiorari by this Court are contained in Rule 10 of the Supreme Court Rules. As set forth therein, certiorari is typically granted where: (a) there is a conflict in decisions among the United States Courts of Appeals on the same important matter, or a court of appeals has decided a case in conflict with a state supreme court; (b) a state court of last resort has decided an important federal question in a manner conflicting with the decision of a state high court or United States court of appeals; or (c) a state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court, or in conflict with a decision of this Court. None of the above factors are even remotely present in the instant case.

Here, the decisions below by a California intermediate court broke no new ground. There are no United States Court of Appeals decisions of relevance; there is no decision on point of the California Supreme Court, let alone that of any other state high court; and there is no important unsettled question of law to be decided by this Court, or a decision contrary to the governing cases of this Court. Rather, a state intermediate level court has decided issues based strictly in local state law. Moreover, since this matter involves a dismissal on the pleadings, there is no full record to review.

Even assuming, arguendo, that the adult motion pictures being cablecast in the Los Angles area by the respondents are "obscene" under contemporary community standards within the meaning of *Miller v. California*, 413 U.S.15

(1973), any substantive rights in favor of Petitioner would depend on California law.

Here, Petitioner has attempted to assert a claim for a moral public nuisance. Under California Civil Code § 3480, a public nuisance is one which affects an entire community or neighborhood or a large number of persons, through annoyance or damage inflicted upon individuals. However, under California law, a private person may only maintain an action for a public nuisance if it is specially injurious to himself. California Civil Code § 3493. Petitioner did not allege or claim that Respondents' actions especially injured him under § 3493 in some manner other than that in which the purported injury was caused to the general public, *Koll-Irvine Center Properties v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040, 29 Cal.Rptr.2d 664, 666, and thus he has no viable private action for a public nuisance (C-12).

Cases cited by Petitioner in support of his standing to sue for a public nuisance are inapposite, since they involve governmental attorneys expressly granted the right to bring an action to abate a nuisance under California law. Thus, *People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3rd 315, 165 Cal.Rptr. 73 [petition, pp.5,7] involved an action by the Los Angles City Attorney (C-13); *People ex rel Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 130 Cal.Rptr. 328 [petition, pp.6,13], involved an action brought by the Los Angles County District Attorney and other law enforcement officers (*Id.*). As stated by the California Court of Appeal, neither decision confers standing on private individuals to bring an action on behalf of the public as a private attorney general when government officials, who would have such standing, decline to bring the action (C-13). Thus, the court below properly found that the Petitioner lacked standing to bring this action.

Petitioner's other principal claim is pursuant to the California Unfair Competition Law, codified in Business and Professions Code § 17200, *et seq*. That California statute formerly afforded standing to private plaintiffs who had not suffered any special injury, to bring an action against alleged unfair or unlawful business practices as a private attorney general for injunctive relief and attorney's fees.[4] However, in the instant matter, there has been no unfair or deceptive practice affecting members of the public, as would be required for such a claim. *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267, 10 Cal.Rptr. 2d 538.

Here, as noted by the Court of Appeal, Petitioner has not alleged that members of the public were likely to be deceived by Respondents' business practices. Rather, Petitioner himself alleges that he paid Respondent AT&T premium charges of $11.95 for various pay-per-view, adults-only programs at his own request. Thus, Petitioner could not state a cause of action under the California Unfair Business Practices Act (C-13). Moreover, the cable television industry is highly regulated by both local authorities and the Federal Communications Commission. It may be noted that while Petitioner Clancy complains of a public nuisance as to the cable broadcasts, the subject videos are not sent over the free pubic airwaves. Rather, they are broadcast on a premium cable television network on a pay-per-view basis. Thus, any viewing of the sexually explicit films in question is strictly on a voluntary basis. Apparently Petitioner Clancy has taped

[4] The relevant statutory provisions, California Business and Professions Code §§ 17203, 17204 were modified by the voters of California in the election of November 2, 2004. The current provisions now specifically limit actions by private attorney generals to "any person who has suffered *injury in fact* and has lost money or property as a result of such unfair competition." (Emphasis added.)

hundreds of hours of sexually explicit videos just so that he can complain about them.

In addition, this is not a case presenting an important issue of federal law with significant practical consequences, for which certiorari is sometimes granted, Supreme Court Rule 10(c). Given the recent November, 2004 amendment to the California Unfair Competition Law, it is no longer possible for persons who have voluntarily subjected themselves to a purported injury, such as Petitioner Clancy, to even bring such claims under California law.

## II. Petitioner's Claim Is Foreclosed By *Lawrence v. Texas*

The essence of Petitioner Clancy's claim is that the adult motion pictures cablecast by AT&T (now Comcast) are so "pornographic," that they offend public morality and are therefore a public nuisance to be proscribed by law. However, that argument has been foreclosed by this Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), striking down Texas' anti-sodomy criminal laws preventing private homosexual conduct. In *Lawrence*, this Court expressly rejected the argument of the State of Texas that the legislature considered such conduct to be immoral and subject to being proscribed. Instead, this Court ruled that public morality was not sufficient to even provide a rational basis to sustain the Texas sodomy law concerning private sexual conduct between consenting adults. Not surprisingly, Petitioner utterly ignores *Lawrence* in his petition.

In *Lawrence*, this Court, following its line of cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) [contraception rights]; *Eisenstadt v. Baird*, 405 U.S. 438 (1972) [contraception]; and *Loving v. Virginia*, 388 U.S. 1

(1967) [marriage], upheld the liberty interest right of consenting adults to engage in homosexual acts in the privacy of their own home. Here, Respondents' cable broadcasts are sent into the private homes of subscribers who willingly pay a premium pay-per-view fee – such as Petitioner. Under *Lawrence*, public morality is no longer a legitimate state interest to justify infringing on such private, consensual conduct. Moreover, the viewing of cablecasts of sexually explicit motion pictures does not even involve direct sexual activity, such as upheld in *Lawrence*.

## CONCLUSION

Certiorari is not warranted in this case. The California Court of Appeal's analysis of California law and affirming dismissal of Petitioner's complaint was correct, and the State Supreme Court denied three separate petitions for review. Petitioner Clancy has no standing to bring a claim under California law for public nuisance, or under the State Unfair Competition Law. Under the latter statute as amended, Clancy would no longer have standing to bring a case such as the instant proceeding in California, since his voluntary actions caused him no legal injury. Moreover, Petitioner's complaining of immorality and failure of the government to enforce public morality is not a valid basis for governmental regulation here in light of *Lawrence v. Texas*.

In sum, there is no conflict of decisions among the United States Courts of Appeals or state high courts, and no important federal question of law has been presented.

The petition for certiorari should be denied.

Respectfully submitted,

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